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Trociuk *v.* British Columbia (Attorney General), [2003] 1 S.C.R. 835, 2003 SCC 34

Darrell Wayne Trociuk *Appellant*

v.

Attorney General of British Columbia, Director of

Vital Statistics and Reni Ernst *Respondents*

Indexed as: Trociuk *v.* British Columbia (Attorney General)

Neutral citation: 2003 SCC 34.

File No.: 28726.

2002: December 4; 2003: June 6.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for british columbia

Constitutional law — Charter of Rights — Equality rights — Vital statistics — Birth registration — Vital Statistics Act providing mother with absolute discretion to "unacknowledge" biological father on birth registration forms and not to include surname of father in child's surname — Whether provisions infringe equality rights of fathers — If so, whether infringement justified —

Canadian Charter of Rights and Freedoms, ss. 1, 15(1) — Vital Statistics Act, R.S.B.C. 1996, c. 479, ss. 3(1)(b), 3(6)(b), 4(1)(a).

The appellant and the respondent, Ernst, are the estranged father and mother of triplets. The mother filled out and submitted the statement of live birth on her own, and marked the father as "unacknowledged by the mother". She alone chose and registered the children's surname, pursuant to ss. 3(1)(b) and 4(1)(a) of the British Columbia *Vital Statistics Act*. Under s. 3(6)(b) of the Act, the father is precluded from having the registration altered. The Director of Vital Statistics accordingly refused both of the father's requests to have the birth registration forms amended to include his particulars. The British Columbia Supreme Court dismissed the father's request for a declaration that the legislation violates s. 15(1) of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal, in a majority judgment, upheld that decision.

Held: The appeal should be allowed. Sections 3(1)(b) and 3(6)(b) of the *Vital Statistics Act* are unconstitutional. The declaration of invalidity will be suspended for a period of 12 months.

Sections 3(1)(b) and 3(6)(b) of the Act violate s. 15(1) of the *Charter* because they constitute discrimination on the basis of sex. The impugned provisions explicitly draw a distinction on an enumerated ground, and the claimant was subject to differential treatment on the basis of that ground. On the basis of his sex, the impugned provisions expose the father to the possible arbitrary exclusion of his particulars from his children's birth registration and, consequently, of his participation in choosing their surname. Moreover, having been so exposed, the father is provided no recourse. The impugned distinctions affect significant interests and do so in a way that the reasonable claimant in the appellant's circumstances would perceive as harmful to his dignity. A birth registration is not only an instrument of prompt recording. It evidences the biological ties between parent and child, and including one's particulars on the registration is a means of affirming these ties. Contribution to the process of determining a child's surname is another significant mode of participation in the life of a child. For many in our society, the act of naming a child holds great significance, is often the occasion for celebration and symbolizes familial bonds across generations. Arbitrary exclusion from these means of participation negatively affects an interest that is significant to a father. It is the possibility of his arbitrary and absolute exclusion from the birth registration and the process of naming that gives rise to the reasonable father's perception that his dignity has been infringed. The fact that the impugned provisions permit a mother to "unacknowledge" for good reasons, for example where pregnancy results from rape or incest, does not justify arbitrarily exposing a father, without recourse, to the possible disadvantages that flow from an unacknowledgment that protects neither her legitimate interests nor the best interests of the child.

The impugned provisions are not saved under s. 1 of the *Charter*. While the Act's objective — namely, the accurate and prompt recording of births — is sufficiently important to warrant overriding *Charter* rights and the legislation is rationally connected to that legislative objective, the impugned provisions do not impair the rights of fathers as little as reasonably possible. The risks of mothers falsifying records from fear of the potential negative effects consequent on applications by fathers who

have been justifiably unacknowledged can be essentially eliminated through means that do not negatively affect unjustifiably unacknowledged fathers' interests. Moreover, the legislature itself has chosen means that are less impairing of the father's rights by enacting amendments to the impugned provisions, which provide that the Director of Vital Statistics must include a father's particulars on his child's registration of birth, if the application is accompanied by a paternity order. These amendments demonstrate that the legislature could have chosen less drastic means than it did in the original legislation.

Cases Cited

Applied: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; **referred to:** *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *R. v. Jones*, [1986] 2 S.C.R. 284; *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122; *Young v. Young*, [1993] 4 S.C.R. 3; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

Statutes and Regulations Cited

Adoption Act, R.S.B.C. 1996, c. 5, s. 13(1)(c), (2)(a).

Canadian Charter of Rights and Freedoms, ss. 1, 15(1).

Constitution Act, 1982, s. 52.

Health Planning Statutes Amendment Act, S.B.C. 2002, c. 15, s. 23.

Name Act, R.S.B.C. 1996, c. 328, s. 4(3), (4).

Vital Statistics Act, R.S.B.C. 1996, c. 479, ss. 3(1)(b), (d), 3(6)(b), (d), 3(6.1), 4(1)(a).

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Castelli, Mireille D. "Rapport de l'O.R.C.C. sur le nom et l'identité physique de la personne humaine" (1976), 17 *C. de D.* 373.

Elliot, Robin. "Developments in Constitutional Law: The 1989-90 Term" (1991), 2 *Sup. Ct. L. Rev.* (2d) 83.

Mendes, Errol P. "The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section 1", in Gérald-A. Beaudoin and Errol P. Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 3rd ed. Scarborough: Carswell, 1996, 3-1.

APPEAL from a judgment of the British Columbia Court of Appeal (2001), 90 B.C.L.R. (3d) 1, 152 B.C.A.C. 243, 200 D.L.R. (4th) 685, 18 R.F.L. (5th) 172, 83 C.R.R. (2d) 74, [2001] 7 W.W.R. 415, [2001] B.C.J. No. 1052 (QL), 2001 BCCA 368, affirming a decision of the British Columbia Supreme Court (1999), 67 B.C.L.R. (3d) 389, 47 R.F.L. (4th) 79, 64 C.R.R. (2d) 323, [1999] B.C.J. No. 1146 (QL). Appeal allowed.

Dairn O. Shane, for the appellant.

Jeffrey M. Loenen, for the respondents the Attorney General of British Columbia and the Director of Vital Statistics.

Martin O. Screech, for the respondent Reni Ernst.

The judgment of the Court was delivered by

DESCHAMPS J. —

I. Introduction

1 Can legislation validly permit the arbitrary exclusion of a father's particulars from his children's birth registrations and, as a result, preclude him from participating in the choice of their surname?

2 Mr. Darrell Wayne Trociuk and Ms. Reni Ernst are the parents of triplets born on January 29, 1996. The mother filled out and submitted the statement of live birth on her own, and marked the father as "unacknowledged by the mother". She alone chose and registered the children's surname. She acted in accordance with ss. 3(1)(b) and 4(1)(a) of the *Vital Statistics Act*, R.S.B.C. 1996, c. 479 (the "Act"). Section 3(1)(b) provides that:

> **3** (1) Within 30 days after the birth of a child in British Columbia,
>
> . . .
>
> (b) the child's mother, if the father is incapable or is unacknowledged by or unknown to the mother,
>
> . . .
>
> must complete and deliver to the district registrar a statement in the form required by the director respecting the birth.

Section 4(1)(a) provides that:

> **4** (1) The surname of a child must be registered as follows:

(a) if only one parent completes the statement under section 3, the surname must be the one chosen by that parent;

3 Section 3(6)(b) of the Act precludes the father from altering the registration. It provides that:

3 . . .

(6) If a statement completed by only one parent of the child or by a person who is not the child's parent is registered, the director must alter the registration of birth on application of any of the following persons:

. . .

(b) the child's mother, if the father is incapable or is unacknowledged by or unknown to the mother;

4 The father and mother became estranged. On April 2, 1997, the father obtained court-ordered supervised access. On May 15, 1997, the court ordered that the mother have interim custody and child support and that paternity testing be undertaken. On September 5, 1997, the court recognized Mr. Trociuk as the father. In that and subsequent hearings, the chambers judge declined to amend the birth registration forms to include the father's particulars and to change the surnames of the triplets. The father twice requested that the Director of Vital Statistics amend the birth registration forms to include his particulars. Both requests were refused.

5 The father petitioned for mandamus orders compelling the Director of Vital Statistics to register him on the birth registration forms and to change the names of the children from "Ernst" to "Ernst-Trociuk". He also asked the court to exercise its *parens patriae* jurisdiction to order that the children bear the hyphenated name. Finally, the father asked for a declaration that s. 3(1) of the Act discriminates on the basis of sex and violates s. 15(1) of the *Canadian Charter of Rights and Freedoms*.

6 In a decision released May 17, 1999, Collver J. dismissed the petition for mandamus, the request that the court exercise its *parens patriae* jurisdiction, and the *Charter* claim (*T. (D.W.) v. British Columbia (Attorney General)* (1999), 67 B.C.L.R. (3d) 389). Collver J. did not directly address the question of whether the impugned legislation breached s. 15(1), finding instead that if there were such a breach, the legislation would be saved under s. 1. Mr. Trociuk appealed. In concurring reasons released May 23, 2001, Southin and Newbury JJ.A. wrote to dismiss. They also rejected arguments supporting Mr. Trociuk's position put forward by an *amicus curiae* who represented the children (*T. (D.W.) v. British Columbia (Attorney General)* (2001), 90 B.C.L.R. (3d) 1). Prowse J.A. dissented with respect to the s. 15(1) claim. She would have found that there was a violation and that it was not saved under s. 1.

II. Analysis

7 The only points in issue before this Court are whether ss. 3(1)(b) and 3(6)(b) of the Act violate s. 15(1) of the *Charter* because they constitute discrimination on the basis of sex and if so, whether the impugned provisions are saved under s. 1. While the impugned legislation necessarily touches a variety of interests, including the best interests of children, these are to be addressed in the present case within the parameters of the ss. 15(1) and 1 analyses.

A. *Section 15(1) and the Law Test*

8 Section 15(1) provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

9 Applications of s. 15(1) are now guided by the test set out in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. In the present case, the first two elements of that test are clearly satisfied. The impugned provisions explicitly draw a distinction on an enumerated ground, and the claimant was subject to differential treatment on the basis of that ground (para. 39).

10 Sections 3(1)(b) and 3(6)(b) of the Act distinguish between mothers and fathers. This distinction is drawn on the basis of sex as only women can be mothers and men fathers. The distinction gives rise to differential treatment as fathers are disadvantaged by comparison to mothers. When

unacknowledged by the mother, fathers are disadvantaged with respect to their ability to have their particulars included on the birth registration and to participate in determining their children's surname.

11 First, taken together, the impugned provisions allow the permanent exclusion of a father's particulars from the birth registration if a mother, for any or no reason, chooses to "unacknowledge" (list on the birth registration as "unacknowledged") him. If a mother under s. 3(1)(b) so chooses and registers the birth without his particulars, s. 3(6)(b) precludes the father from altering the registration.

12 Second, ss. 3(1)(b) and 4(1)(a) of the Act permit a mother to unacknowledge a father for any or no reason and thereby to exclude him from the process of determining the surname of his children. After the initial decision to unacknowledge, neither the Act nor the *Name Act*, R.S.B.C. 1996, c. 328, provides the father any recourse. Under the latter legislation, even if he were the custodial parent, he would require the mother's consent to change the surname (s. 4(3) and (4)).

13 The foregoing discussion leads to the conclusion that the impugned provisions draw an explicit distinction on the enumerated ground of sex and that this distinction gives rise to differential treatment. On the basis of his sex, these provisions expose the father to the possible arbitrary exclusion of his particulars from his children's birth registration and, consequently, of his participation in choosing their surname. Moreover, having been so exposed, the father is provided no recourse. The sole remaining question under the *Law* test is whether, from the perspective of the reasonable claimant, the present differential effects constitute a violation of dignity (para. 61). To answer this question, I will begin by assessing the claim that the father's interest in the present case is insignificant.

The Dignity Analysis

(a) *The Significance of the Father's Interest*

14 The respondents before this Court characterized the effects of the impugned legislative distinctions on the claimant as insignificant and claimed therefore that they cannot give rise to discrimination. Southin J.A. agreed that the distinction did not result in discrimination (para. 85). I find the opposite. The impugned distinctions affect significant interests and do so in a way that the reasonable claimant in the appellant's circumstances would perceive as harmful to his dignity.

15 Parents have a significant interest in meaningfully participating in the lives of their children. In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 85,

La Forest J. wrote that "individuals have a deep personal interest as parents in fostering the growth of their own children". In a similar vein, Wilson J. in *R. v. Jones*, [1986] 2 S.C.R. 284, at p. 319, wrote: "The relations of affection between an individual and his family and his assumption of duties and responsibilities towards them are central to the individual's sense of self and of his place in the world."

16 Including one's particulars on a birth registration is an important means of participating in the life of a child. A birth registration is not only an instrument of prompt recording. It evidences the biological ties between parent and child, and including one's particulars on the registration is a means of affirming these ties. Such ties do not exhaustively define the parent-child relationship. However, they are a significant feature of that relationship for many in our society, and affirming them is a significant means by which some parents participate in a child's life. The significance of this affirmation is not only subjectively perceived. The legislature of British Columbia has attached important consequences to the presence of a father's particulars on his child's birth registration. It has decided that where a father's particulars are included on the birth registration, his consent is always required for his child's adoption. However, where his particulars are not included, a father must fulfill at least one of an alternative set of conditions. As Prowse J.A. notes, ss. 13(1)(c) and 13(2)(a) of the *Adoption Act*, R.S.B.C. 1996, c. 5, provide that "a father who is named on the birth registration must be given notice of the proposed adoption of his child. He may, or may not, qualify for notice apart from registration" (para. 141).

17 Contribution to the process of determining a child's surname is another significant mode of participation in the life of a child. For many in our society, the act of naming a child holds great significance. As Prowse J.A. notes, naming is often the occasion for celebration and the surname itself symbolizes, for many, familial bonds across generations (paras. 138-39).

18 The significance of choosing a surname is particularly evident if viewed in light of the rationales for reforms which extended to mothers the ability to transmit their surnames to their children. As Professor Castelli wrote on this subject, in a comment on the (Quebec) Civil Code Revision Office's *Report on the Name and Physical Identity of Human Persons*:

> [TRANSLATION] . . . one of the most serious and most fundamental inequalities is indeed for women not to be able to pass on their surnames; for that matter, this is how that impossibility has always been viewed: a sign of the inferiority of women and their incapacity to perpetuate a line by filiation; was it not regarded ... as a misfortune not to have a son, precisely because the "line", the "name", died out with girls, who were unable to perpetuate them. People in our time have admittedly become relatively indifferent to those sorts of considerations; nevertheless, transmission of the surname remains the symbol of filiation, and it is not normal to deny to women any possibility of seeing their surnames passed on to their children or to some of them.

> (M. D. Castelli, "Rapport de l'O.R.C.C. sur le nom et l'identité physique de la personne humaine" (1976), 17 *C. de D.* 373, at p. 374)

Although the activity of naming may not hold the same significance for all, it is clearly important to many in our society. A father who is arbitrarily excluded from this activity would reasonably perceive that a significant interest has been affected.

19 The conclusion flowing from the above is that a father's ability to include his particulars on a child's birth registration and to contribute to the process of determining the child's surname can reasonably be perceived to be modes of meaningful participation in a child's life. As a further consequence, arbitrary exclusion from such means of participation negatively affects an interest that is significant to a father. I turn now to the question of whether the impugned provisions affect this interest in a way that a reasonable claimant would view as demeaning to his dignity.

(b) *The Effect of the Distinction on the Father's Dignity*

20 Counsel for the mother cites *Law*, *supra*, to support the argument that the father's s. 15(1) claim is "weakened" because he does not belong to an historically disadvantaged group. This argument is ill founded as a matter of logic and law. Although the Court in *Law* held that historical disadvantage is "probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory" (para. 63), it does not follow that the absence of historical disadvantage is a compelling factor against a finding of discrimination. Moreover, it is settled law that neither the presence nor absence of any of the contextual factors set out in *Law* is dispositive of a s. 15 (1) claim (*Law*, at para. 62; *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84, at para. 126, *per* L'Heureux-Dubé J.). This is so because no single factor can determine, in all circumstances, whether a reasonable claimant would perceive that an impugned distinction infringes his or her dignity.

21 In the present case, the reasonable claimant in the father's position, apprised of all relevant circumstances, would observe that the impugned provisions impose a disadvantage on him that they do not impose on a mother. It would be reasonable for him to perceive that the legislature is sending a message that a father's relationship with his children is less worthy of respect than that between a mother and her children. Given the centrality of such relationships to an individual's identity, a reasonable claimant would perceive the message to be a negative judgment of his worth as a human being (*Law*, *supra*, at para. 64).

22 The impugned provisions affect the claimant's dignity in another way. Under the Act, there are three categories of fathers whose particulars can be excluded from the registration, and who can be precluded from participating in deciding the surname of their children. The first is composed of those fathers who are arbitrarily unacknowledged pursuant to s. 3(1)(b). The second category contains fathers who are unackowledged for valid reasons, pursuant to the same section. The third is composed of those fathers who are incapable or unknown under ss. 3(1)(b) and 3(1)(d). The latter provision states:

> **3** (1) Within 30 days after the birth of a child in British Columbia,
>
> . . .
>
> (d) if neither parent is capable or if the mother is incapable and the father is unacknowledged by or unknown to her, the person standing in the place of the parents of the child
>
> must complete and deliver to the district registrar a statement in the form required by the director respecting the birth.

23 A father who belongs to the first category would reasonably perceive that the legislature considers his relationship with his children to be similar to the relationships of fathers in the other categories. Such an association is pejorative. It is demeaning to one's dignity to be perceived as incapable or unknown within the meaning of s. 3(1)(b) when one is not. In addition, fathers in the first category, to whom no reasons justifying their exclusion from the registration of birth apply, should not be compared or confused with fathers who are justifiably excluded. Among those included in the latter category are rapists and perpetrators of incest. Finally, since there is no mechanism for redress in the event of an unjustified exclusion, fathers who want to create a symbolic tie between themselves and their children may be confused with fathers who do not attempt to have their particulars included on the registration of birth. Such confusion is disrespectful to fathers who want to participate in their children's lives through the inclusion of their particulars.

24 Such false and pejorative associations have a communicative effect similar to stereotypes or prejudices. The impugned legislation subjects the claimant to this negative attribution because of a personal characteristic, namely being a male. In addition, a father burdened with the present unfair associations, like the racial minority subject to a stereotype, cannot change the personal characteristic, sex or race, which is the determining cause of the association (see *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 13). Such a state of affairs is definitional of discrimination.

25 It is the possibility of his arbitrary and absolute exclusion from the birth registration and the process of naming that gives rise to the reasonable father's perception that his dignity has been infringed. There may be compelling reasons for permitting a mother to unacknowledge a father at birth, to exclude his particulars from the registration, and to permanently preclude his participation in determining the child's surname. Such is the case of a mother who has become pregnant as a result of rape or incest. However, the fact that the impugned provisions permit a mother to unacknowledge for good reasons does not justify arbitrarily exposing a father, without recourse, to the possible disadvantages that flow from an unacknowledgment that protects neither her legitimate interests nor the best interests of the child.

(c) *Proposed Ameliorative Purposes or Effects*

26 Newbury J.A. held, and counsel for the respondent, Reni Ernst, argued, that in cases where a mother has good reasons for unacknowledging a father, providing the latter the opportunity to dispute the unacknowledgement would lead to negative effects. Newbury J.A. reasoned that such an opportunity would be "a serious incursion into the interests of the mother" and would not be in the best interests of the child (paras. 177 and 186). Counsel for the respondents, the Attorney General of British Columbia and the Director of Vital Statistics, drew an analogy between the present case and *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122, at pp. 131-32. Counsel argued that the aim of the legislation was to provide a mother who has valid reasons for unacknowledging the father with certainty that there would be no disclosure of the father's identity. This certainty, it was argued, would encourage mothers to report the birth event. Counsel argued that to give a father an opportunity to challenge and possibly overturn the unacknowledgement would be to remove this certainty.

27 Placed within the rubric of the *Law* test, this reasoning is best evaluated under the "ameliorative purpose or effects" contextual factor of the dignity analysis. In *Law*, this factor was described, at para. 72:

> An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation.

In the submissions of counsel for the respondents and Newbury J.A.'s reasons on this point, there are two relevant disadvantaged groups in the present case: (1) women, and more specifically, women who have valid reasons to unacknowledge a father, and (2) children.

28 It must be emphasized that the inquiry into this factor, as with all the contextual factors, must be conducted from the perspective of the reasonable claimant, that is, of a "reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant" (*Law*, at para. 60). Also, as noted above, neither the presence nor absence of any contextual factor determines the outcome of the dignity analysis. Therefore, even if a legislative distinction serves a relevant ameliorative purpose, the reasonable claimant may still perceive that his or her dignity has been infringed.

29 In the present case, a reasonable claimant would perceive that the legislature could protect a mother from the unwanted disclosure of a justifiably unacknowledged father's identity, without exposing other fathers to the risk of arbitrary exclusion. This possibility is discussed below in the s. 1 analysis. The reasonable claimant would conclude that his exclusion was not necessary to achieving the ameliorative objective. He would reasonably perceive that his significant interest in participating in his children's lives was superfluously sacrificed in the pursuit of that objective. The reasonable claimant would conclude that, despite a correspondence between the ameliorative purpose and the legislative exclusion, his dignity was infringed.

30 With respect to children, the reasonable claimant would contest Newbury J.A.'s implication that preventing conflict at the cost of excluding him from a mode of meaningful participation in his child's life is necessarily in the child's best interests (para. 186). The father who has been arbitrarily unacknowledged might refer to the reasons of McLachlin J. (as she then was) in *Young v. Young*, [1993] 4 S.C.R. 3, at p. 119, for the proposition that "conflict between parents . . . does not necessarily indicate harm" (see also *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141). He might conclude that even at the cost of parental conflict, it is in the best interests of a child to maintain meaningful involvement with him by having his particulars registered and by the choice of that child's surname.

31 Since the above discussion has revealed that including his particulars on a child's birth registration and participating in choosing the surname are means by which a father participates in his child's life, arbitrarily leaving him out of these activities is to exclude him from meaningful involvement. Such exclusion cannot be presumed to be in the best interests of the child, and therefore is not an ameliorative purpose that would justify excluding a father from a mode of meaningful participation in his children's lives.

B. *Section 1*

32 Having concluded that despite providing a potential benefit to some mothers the impugned

provisions infringe s. 15(1), I now turn to the question of whether they are saved under s. 1. Section 1 provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

33 The content of the s. 1 test is well established and consists of two broad inquiries: (1) does the legislation relate to an objective that is sufficiently important to warrant the overriding of *Charter* rights? and (2) are the means chosen to reach this objective proportionate to the objective? (*R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 138-39) The parties agree that the Act's objective was the accurate and prompt recording of births, and that this objective satisfied the first inquiry under *Oakes*. The disagreement focusses on the second branch.

34 If it can be shown that the impugned provisions are not rationally connected to the legislative objective, then they will necessarily fail to be proportionate to the objective (*Oakes*, at pp. 139 and 141). Lamer J. (as he then was), in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1195, held that the rational connection requirement is satisfied where there is "a link or nexus based on and in accordance with reason, between the measures enacted and the legislative objective". Iacobucci J. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, at para. 228, remarked that "[t]his test is not particularly onerous". As Professor R. Elliot has noted, it will be satisfied "[s]o long as those actions can rationally be said to further the objectives the government seeks to rely on" ("Developments in Constitutional Law: The 1989-90 Term" (1991), 2 *Sup. Ct. L. Rev.* (2d) 83, at p. 144; see also E. P. Mendes, "The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section 1", in G.-A. Beaudoin and E. P. Mendes, *The Canadian Charter of Rights and Freedoms* (3rd ed. 1996), 3-1, at p. 3-21).

35 In considering the present legislation, Newbury J.A. reasoned that a mother who wanted to unacknowledge a father for *bona fide* reasons might falsify the birth registration to avoid negative effects flowing from a father's subsequent attempt to alter the registration or participate in determining the child's surname (paras. 177 and 183-86). If legislation does not provide for the possibility of such an attempt, the incentive for a mother to falsify the registration is reduced, and so is the likelihood of such falsification. By excluding precisely this possibility, the present legislation aims at furthering accurate reporting, and is therefore rationally connected to the legislative objective.

36 Although the legislative means are rationally connected to the legislative objective, if it can be shown that they do not minimally impair the right at issue, they will still fail to satisfy the proportionality element of the *Oakes* test (*supra*, at p. 139). In applying the minimal impairment requirement, a court is required to afford the legislature a margin of appreciation (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 999). That a court can propose means that are less impairing than the impugned legislation is not sufficient to give rise to a finding that an impairment is not minimal (*Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, *supra*, at p. 1138). However, if legislation does not impair an individual's rights "as little as is reasonably possible" (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 772), if in other words, legislation falls beyond "a range of reasonable alternatives" (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160), it will not satisfy the minimal impairment requirement.

37 The present legislation does not impair the rights of fathers as little as reasonably possible. The risks of mothers falsifying records from fear of the potential negative effects consequent on applications by fathers who have been justifiably unacknowledged, can be essentially eliminated. Most importantly, this result can be achieved through means that do not negatively affect unjustifiably unacknowledged fathers' interests.

38 An application procedure could be designed to control the particular negative effects on mothers that may flow from post-unacknowledgement applications. Such effects include unwanted public disclosure of the identities of fathers who have been justifiably unacknowledged, and confrontation in court between mothers and men who have caused them harm. Prowse J.A. has proposed a procedure that would eliminate both these effects. The legislature could provide that a judge in chambers would alone determine whether a father has been justifiably excluded, based solely on affidavit evidence (para. 158). A mother informed of such a procedure would not reasonably seek to protect her privacy and to avoid having to confront in court a man who has harmed her, by falsifying her child's registration.

39 The preceding discussion has set out means by which the stated legislative objective could have been met without exposing a father to the arbitrary and final exclusion of either his particulars from the birth registration or his participation from the process of determining his child's surname. These means permit the attainment of the stated objectives without impairing a father's interests. Given these possibilities, it can be concluded that the impugned legislation did not impair the present father's rights as little as reasonably possible.

40 Moreover, the legislature itself has chosen means that are less impairing of the father's rights. The respondents the Attorney General of British Columbia and the Director of Vital Statistics brought to this Court's attention that on October 1, 2002, s. 23 of the *Health Planning Statutes Amendment Act*, S.B.C. 2002, c. 15, came into force, amending s. 3 of the Act. That section provides:

23 Section 3 of the Vital Statistics Act, R.S.B.C. 1996, c. 479, is amended

(a) in subsection (6) by adding the following paragraph:

(d) the child's mother or father, if the application is accompanied by a copy of an order of the court declaring the child's paternity, unless the court orders that the father's particulars are not to be included on the child's registration of birth., *and*

(b) by adding the following subsection:

(6.1) Subsection (6)(d) does not apply to an order of the court declaring the child's paternity made before October 1, 2002, but

(a) the mother or father may apply to the court in the proceeding in which the paternity order was made for an order that the father's particulars are to be included on the child's registration of birth, and

(b) the director must alter the registration of birth on application of the mother or father if the application is accompanied by a copy of an order under paragraph (a).

41 Since these amendments were not in issue before this Court, the present reasons do not decide the question of whether they adequately remedy the constitutional defect in the impugned legislation. However, I do note that the amendments provide that the Director of Vital Statistics must include a father's particulars on his child's registration of birth, if the application is accompanied by a paternity order. Only if the court orders that the father's particulars are not to be included can such an application be denied. I have found above that the impugned provisions prejudice a father's right to equality, in part, because they deny him any possibility of altering the birth registration after a mother's unacknowledgement. Since these amendments provide for such a possibility, they impair the father's rights less than the impugned provisions, which had the effect of excluding this possibility entirely. These amendments evidence that the legislature could have chosen less drastic means than it did in the unamended legislation. Therefore, the impugned provisions were not minimally impairing as they fell short of a less impairing alternative crafted by the legislature itself.

42 The amendments also show that the impugned provisions were not minimally impairing in the context of naming. As discussed above, precluding fathers from post-unacknowledgement applications has been justified on the grounds that it will deter mothers from falsifying registrations, and eliminate their fear of negative effects that may accompany such applications. However, the simple fact that the amendments provide for any application procedure at all evidences that these justifications are insufficient. If these grounds are not sufficient to preclude fathers' post-unacknowledgement applications in the context of including their particulars on birth registrations, it is difficult to see how they can support precluding a similar application to change their children's surnames. As a result, the fact that the legislature provided an application procedure for including particulars, but failed to do so for naming, suggests that this failure is outside the range of minimally impairing legislative alternatives.

III. Remedies

43 In conclusion, ss. 3(1)(b) and 3(6)(b) of the Act are invalid because they have the effect of infringing the claimant's s. 15 right to be protected against discrimination based on sex and they are not saved by s. 1. As has been done before (*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721), the declaration of invalidity under s. 52 of the *Constitution Act, 1982* will be delayed to provide the legislature an opportunity to remedy the constitutional defects. A delayed declaration of invalidity is the appropriate remedy in the present circumstances. This Court in *Schachter v. Canada*, [1992] 2 S.C.R. 679, held that a delayed declaration is appropriate where an immediate declaration of invalidity harms those who rightly benefit from a legislative regime, while extending nothing to those who are improperly excluded from it. In the present case, an immediate declaration of invalidity would harm mothers who would want to unacknowledge fathers for legitimate reasons, while extending no benefits to fathers who are excluded. By contrast, a delayed declaration permits the legislature to remedy the constitutional defect without compromising the interests of mothers.

44 Mr. Trociuk asks this Court to order that his particulars be included on the registration of birth and that his children's surname be changed to Ernst-Trociuk. The amended legislation provides a procedure by which Mr. Trociuk can apply to have his particulars included on the birth registration. That is the appropriate means by which to achieve this end. The children are now 7 years old. This Court is not in a position to determine whether the asked-for change of surname is in the best interests of the children and, absent the consent of both parents, this surely must be considered before an order to change the surname can be made. The request is therefore denied.

45 In conclusion, it is noted that it is not appropriate for this Court to set out a legislative regime that would satisfy the requirements of s. 15(1). However, any adequate legislative response to the declaration of invalidity must account for the variety of interests discussed above, including the legitimate interests of the mother, the right of the father not to be discriminated against on the basis of

his sex and the best interests of the child.

IV. Disposition

46 For the foregoing reasons, the appeal is allowed with costs throughout. The Court's declaration of invalidity with respect to ss. 3(1)(b) and 3(6)(b) will be suspended for a period of 12 months. If the constitutional defect has not been remedied at that time, the provisions will be of no force and effect by operation of s. 52 of the *Constitution Act, 1982*.

47 The constitutional questions, stated by the Chief Justice on July 9, 2002, are answered as follows:

Question 1: Do ss. 3(1)(b) and 3(6)(b) of the British Columbia *Vital Statistics Act*, R.S.B.C. 1996, c. 479, on their own or in their effect, discriminate against biological fathers on the basis of sex, by providing biological mothers with sole discretion to include or exclude information relating to biological fathers when registering the birth of a child, contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

Question 2: If question 1 is answered in the affirmative, is the discrimination a reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

Answer: No.

Appeal allowed with costs.

Solicitors for the appellant: Simpson Thomas & Associates, Vancouver.

Solicitor for the respondents the Attorney General of British Columbia and the Director of Vital Statistics: Ministry of Attorney General of British Columbia, Victoria.

Solicitors for the respondent Reni Ernst: MacIsaac and Company, Nanaimo.